

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

316

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH WEAVER,

Defendant-Appellant.

Criminal No. 1428-70

Docket No. 71-1172

ON APPEAL FROM A JUDGMENT
OF THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

Malcolm Lassman
Akin, Gump, Strauss, Hauer & Feld
602 Madison Office Building
1155 Fifteenth Street, N. W.
Washington, D. C. 20005

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 10 1971

Nathaniel J. Paulson
CLERK

Counsel for Appellant
By Appointment of the
United States Court of Appeals

INDEX

STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
ARGUMENT	
I. The Trial Judge Erred In Denying Appellant's Motion For Judgment Of Acquittal	6
A. Essential Elements	6a
B. The Standard for Passing on Motion for Acquittal	8
C. The Government's Evidence Was Insufficient To Warrant Conviction	11
II. The Trial Judge Erred In Failing To Adequately Instruct the Jury As To "Knowledge", An Essential Element Of The Crime	17
CONCLUSION	20

AUTHORITIES CITED

<u>Cases:</u>	<u>Page:</u>
<u>Araujo-Lopez v. United States</u> , 405 F.2d 466 (9th Cir. 1969)	12
<u>Arellanes v. United States</u> , 302 F.2d 603 (9th Cir. 1962)	10
<u>Arizona v. Hunt</u> , 370 P.2d 642 (S.Ct. Ariz. 1962)	7 15
* <u>Baker v. District of Columbia</u> , 184 A.2d 198 (D.C. Mun. App. 1962)	10
* <u>Bailey v. United States</u> , 135 U.S. App. D.C. 95, 416 F.2d 1110 (D.C. Cir. 1969)	9
<u>Borum v. United States</u> , 127 U.S. App. D.C. 48, 380 F.2d 595 (D.C. Cir. 1967)	14, 15
<u>Broic v. Florida</u> , 79 So.2d 755 (S.Ct. Fla. 1955)	7
* <u>Byrd v. United States</u> , 119 U.S. App. D.C. 360, 342 F.2d 939 (D.C. Cir. 1965)	17, 18
* <u>Carroll v. Arizona</u> , 368 P.2d 649 (S.Ct. Ariz. 1962)	7, 16
<u>Crawford v. United States</u> , 126 U.S. App. D.C. 156, 375 F.2d 323 (D.C. Cir. 1967)	8-9
* <u>Curley v. United States</u> , 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), <u>cert. denied</u> , 331 U.S. 837 (1947)	8
<u>Davis v. Maryland</u> , 262 A.2d 572 (Ct. Spec. App. Md. 1970)	7
* <u>Davis v. United States</u> , 230 A.2d 485 (D.C. App. 1967) ..	12
* <u>Finley v. United States</u> , 352 F.2d 921 (10th Cir. 1966) .	19, 20
<u>Glasser v. United States</u> , 315 U.S. 60 (1942)	9
<u>Gordon v. United States</u> , 438 F.2d 858 (5th Cir. 1971) ..	9
<u>Guevara v. United States</u> , 242 F.2d 745 (5th Cir. 1957) .	12

<u>Hale v. United States</u> , 410 F.2d 147 (5th Cir. 1969)	10
<u>Hawaii v. Stuart</u> , 466 P.2d 444 (S.Ct. Hawaii 1970).....	10
* <u>Hiet v. United States</u> , 124 U.S. App. D.C. 313, 365 F.2d 504 (D.C. Cir. 1966)	10, 14, 15
* <u>Hill v. District of Columbia</u> , 264 A.2d 145 (D.C. App. 1970)	9, 10, 13-14
<u>Holland v. United States</u> , 348 U.S. 121 (1954)	9
<u>Illinois v. Picrenet</u> , 186 N.E.2d 306, (S.Ct. Ill. 1962)	7, 15
<u>Illinois v. Truelock</u> , 220 N.E.2d 187 (S.Ct. Ill. 1966)	7
* <u>Jackson v. District of Columbia</u> , 180 A.2d 825 (D.C. Mun. App. 1962)	9
* <u>Jackson v. United States</u> , 121 U.S. App. D.C. 160, 348 F.2d 772 (D.C. Cir. 1965)	17, 19
* <u>Johnson v. United States</u> , U.S. App. D.C. , 426 F.2d 651 (D.C. Cir. reh. en banc 1970), cert. granted, 400 U.S. 264 (1970)	9
<u>Lawrence v. United States</u> , 400 F.2d 524 (9th Cir. 1968)	14
* <u>Liles v. United States</u> , 129 U.S. App. D.C. 268, 393 F.2d 669 (D.C. Cir. 1967)	17, 19
<u>Louisiana v. Maney</u> , 135 So.2d 473 (S.Ct. La. 1961)	7
<u>McDonald v. United States</u> , 109 U.S. App. D.C. 98, 284 F.2d 232 (D.C. Cir. 1960)	17, 19
* <u>Malloy v. United States</u> , 246 A.2d 781 (D.C. App. 1968)	6a, 9, 10, 11, 12
<u>Massachusetts v. Buckley</u> , 238 N.E.2d 335 (S.J.C. Mass. Suffolk 1962)	8
<u>Massachusetts v. Lee</u> , 117 N.E.2d 830 (S.J.C. Mass. Worcester 1954)	7

<u>Massachusetts v. Tirella</u> , 249 N.E.2d 573 (S.J.C. Mass. Suffolk 1969)	8
<u>Medina v. Texas</u> , 296 S.W.2d 273 (Tex. Crim. App. 1956)	7
<u>Mickens v. Colorado</u> , 365 P.2d 679 (S.Ct. Colo. 1961)	7
<u>Miller v. United States</u> , 120 F.2d 968 (10th Cir. 1941)	19
<u>Missouri v. Thomas</u> , 452 S.W.2d 160 (S.Ct. Mo. 1970)	10
<u>Mitchell v. United States</u> , 129 U.S. App. D.C. 292, 394 F.2d 757 (D.C. Cir. 1968)	17, 19
<u>Montova v. United States</u> , 402 F.2d 847 (5th Cir. 1968)	13
<u>Mullen v. United States</u> , 105 U.S. App. D.C. 25, 263 F.2d 275 (D.C. Cir. 1958)	17
<u>New Mexico v. Giddings</u> , 352 P.2d 1003 (S.Ct. N.M. 1960)	19
<u>New Jersey v. Reed</u> , 170 A.2d 419 (S.Ct. N.J. 1961)	7
<u>New Mexico v. Gonzalez</u> , 435 P.2d 210 (N.M.App. 1967)	7
<u>New York v. Pimpen</u> , 227 N.Y.S.2d 64 (N.Y. App. Div. 1962)	7
* <u>People v. Jackson</u> , 23 Ill.2d 360, 178 N.E.2d 320 (S.Ct. Ill. 1967)	13
<u>Petty v. Colorado</u> , 447 P.2d 217 (S.Ct. Colo. 1968)	7, 15
<u>Powell v. United States</u> , 135 U.S. App. D.C. 254 418 F.2d 470 (D.C. Cir. 1969)	9
* <u>Screws v. United States</u> , 325 U.S. 91 (1945)	18, 19, 19-20

<u>Cosa v. Texas</u> , 375 U.S. 658 (Tex. Crim. App. 1955)	7, 19
* <u>Stevens v. United States</u> , 175 U.S. App. D.C. 332, 319 F.2d 733 (D.C. Cir. 1963)	14
<u>Surrett v. United States</u> , 421 F.2d 403 (5th Cir. 1970)	10
<u>U.S. v. Jones</u> , 174 F.2d 746 (9th Cir. 1949)	6
<u>U.S. v. Perolies</u> , 165 F.2d 874 (7th Cir. 1948)	6
<u>United States v. Bridges</u> , U.S. App. D.C., 432 F.2d 692 (D.C. Cir. 1970)	9
* <u>United States v. Bryant</u> , 137 U.S. App. D.C. 124, 420 F.2d 1327 (D.C. Cir. 1969)	17, 19
<u>United States v. Carey</u> , 428 F.2d 229 (5th Cir. 1970), cert. denied, 91 S.Ct. 78 (1970)	14
<u>United States v. Collon</u> , 426 F.2d 939 (5th Cir. 1970)	15
* <u>United States v. Fox</u> , 140 U.S. App. D.C., 433 F.2d 1235 (D.C. Cir. 1970)	10
<u>United States v. Harris</u> , 346 F.2d 184 (4th Cir. 1965) ..	18
<u>United States v. Hernandez</u> , 220 F.2d 86 (2nd Cir. 1951)	18
<u>United States v. Howey</u> , 427 F.2d 1017 (9th Cir. 1970)	20
<u>United States v. Krosky</u> , 418 F.2d 65 (6th Cir. 1969) ..	18
<u>United States v. Landry</u> , 257 F.2d 425 (7th Cir. 1958) ..	13
<u>United States v. Mills</u> , 293 F.2d 609 (3rd Cir. 1961) ..	13
<u>United States v. Schmidt</u> , 376 F.2d 751 (4th Cir. 1967)	18
<u>United States v. Sutton</u> , U.S. App. D.C., 426 F.2d 1202 (D.C. Cir. 1969)	9

<u>United States v. Urbana</u> , 412 F.2d 108 (5th Cir. 1969)	19
<u>Virgin Islands v. Carmona</u> , 422 F.2d 95 (3rd Cir. 1970)	19
<u>Walker v. United States</u> , 342 F.2d 22 (5th Cir. 1965), cert. denied, 382 U.S. 859 (1965)	19
<u>Wallace v. Nevada</u> , 359 P.2d 749 (S.Ct. Nev. 1961)	7
<u>Washington v. Boggs</u> , 358 P.2d 124 (S.Ct. Wash. 1961)	7
<u>Washington v. Jennings</u> , 475 P.2d 926 (Ct. App. Wash. 1970)	8
<u>Wheeler v. United States</u> , 382 F.2d 998 (10th Cir. 1967)	14
<u>Williams v. United States</u> , 75 U.S. App. D.C. 299, 131 F.2d 21 (D.C. Cir. 1942)	17, 19
<u>Statutes:</u>	
18 U.S.C. §641	19, 20
33 D.C. Code 402	1, 2, 6, 6a
<u>Miscellaneous:</u>	
Uniform Narcotic Drug Act §2 (91 A.L.R.2d 811)	6a
2 Wright, Federal Practice and Procedure §463 (1970)...	6, 18
Transcript	5-12, 19-21, 24-31, 34-35, 42-43, 47-51, 64-66

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Criminal No. 1428-70

v.

Docket No.

JOSEPH WEAVER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

STATEMENT OF THE ISSUES

- I. Did The Trial Judge Err In Denying Appellant's Motions For Judgment Of Acquittal?
- II. Did The Trial Judge Err In Failing To Adequately Instruct The Jury As To "Knowledge", An Essential Element Of The Crime?

This case has not previously been before the court.

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the District of Columbia on February 12, 1971, after a one-day trial before District Judge George L. Hart, Jr., and a jury resulting in the conviction of Appellant Weaver on one count of knowingly, unlawfully possessing, and having under his control a narcotic drug in violation of 33 D.C. Code 402. Appellant was sen-

tenced to be imprisoned for a period of not less than two (2) years and not more than six (6) years. Appellant is confined in Lorton Penitentiary.

STATEMENT OF FACTS

On August 25, 1970, a True Bill was returned against Appellant Weaver. Appellant was charged with conduct violative of 33 D.C. Code 402. The True Bill alleges that "on or about April 28, 1970, within the District of Columbia, Joseph Weaver did knowingly and unlawfully possess and have under his control a narcotic drug" Appellant pleaded not guilty.

Prior to trial, Appellant Weaver seasonably filed a motion to suppress as evidence the narcotic drug alleged to have been in his possession on April 28, 1970.

The jury was selected, the openings were made, and the introduction of evidence began, on December 9, 1970.

At the trial there was evidence of the following:

The Appellant is married and the father of two children. At the time of his arrest he was working part-time and going to school part-time (Tr. 41).

On April 28, 1970, Appellant was a passenger in a car driven by an acquaintance, a Mr. Hardy. The car was headed down Florida Avenue. Metropolitan Police Officers, William F. Penn and Richard L. Jencks were assigned to a cruiser on April 28, 1970, and were cruising in the Northwest section of Washington at about 5:45 p.m. (Tr. 6-7). They

spotted a 1970 Mustang which was driven by Mr. Hardy and in which Appellant was a passenger (Tr. 7). As a result of "certain information concerning the driver (Tr. 23)" the policemen stopped the car^{1/} near the corner of Georgia Avenue and Farragut Street, Northwest, in the District of Columbia (Tr. 8). Shortly before the car was stopped (approximately one block), Appellant testified that he told Mr. Hardy, the driver, to stop at a gas station because Appellant had to urinate (Tr. 42-43).

Officer Jencks approached the Mustang which was parked alongside the public parking lot of a carryout shop, approximately fifteen feet in front of the policecar. Officer Penn remained in the policecar. Mr. Hardy met Officer Penn at the rear of the Mustang (Tr. 8-9).

According to testimony of the arresting officer, Appellant exited the Mustang and walked past the scout car, past Officer Penn, seated in the car, to the corner (Tr. 9). Appellant then walked back and went through the public parking lot into an alley behind the carryout (Tr. 9-10). Both the lot and the alley were open to the general public (Tr. 20, 35).

The officers could see the left part of Appellant's body behind the corner of the carryout shop and they testified that they saw his left hand alongside of his zipper on his trousers and he made motions as if he was urinating. His right hand was moving in the direction of the ground; he disappeared from view. Appellant reappeared and

1. The basis for stopping the car was never more fully explained.

began walking toward the automobile in which he had been a passenger. Officer Penn got out of the patrol car and went into the parking lot and saw a wet area where Appellant was standing and a plastic bag alongside that area on a ledge (Tr. 15-20, 30-35).

In spite of the fact that Officer Penn testified that Appellant walked right past him, he also testified that he never saw the bag in the hand of Appellant, or in his possession, and that he, Officer Penn, had no idea how many people might have been in the public parking lot during the day (Tr. 20). Officer Jencks also testified that he had absolutely no idea how many people may have been in the parking lot prior to the time Appellant entered the area, and that he never saw the bag in Appellant's possession (Tr. 35).

After the testimony of the two officers, the chain of custody and contents of the bag being stipulated,^{2/} the Government closed its case in chief. Appellant then moved for a judgment of acquittal which was denied by the trial judge. (Tr. 39-40).

Appellant, testifying in his own behalf, admitted going behind the building to urinate, but denied placing any narcotics on a ledge behind the building. On cross-examination, Appellant stated that, while he was urinating he could not see the officers, and doubted they could see him. He also denied noticing the ledge on which the narcotics were found and denied seeing the cellophane bag at any time.

2. It was stipulated that the bag contained 7,500 milligrams of cocaine. (Tr. 37)

In rebuttal, evidence was admitted, over Appellant's objection, as to the value of the narcotic drug allegedly in Appellant's control at the time of arrest.

Upon the conclusion of all the government's rebuttal evidence, Appellant again moved for a judgment of acquittal. The trial judge denied Appellant's motion.

On December 10, 1970, the jury returned a verdict of guilty.

Defendant was sentenced to be imprisoned for a period of not less than two (2) years and not more than six (6) years.

Appellant seasonably filed his notice of appeal.

ARGUMENT

1. THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL

As already indicated, Appellant moved for a judgment of acquittal immediately after the conclusion of the Government's case in chief; and his motion was denied. At the conclusion of the Government's rebuttal evidence, Appellant again moved unsuccessfully for a judgment of acquittal.

Appellant believes, for the reasons set forth below, that the evidence adduced by the Government was legally insufficient to warrant submission of the case to the jury or his conviction. Thus, his motions for judgment of acquittal should accordingly have been granted.^{3/}

At the outset, it might be well to set forth briefly some of the principles generally applicable to possession of narcotics cases under 33 D.C. Code 402.

3. The motions by Appellant for a judgment of acquittal properly challenged the sufficiency of the evidence. U.S. v. Jones, 174 F.2d 745 (9th Cir. 1949); U.S. v. Perlies, 165 F.2d 874 (7th Cir. 1948); 2 Wright, Federal Practice and Procedure, Sec. 466 (1970).

A. Essential Elements

33 D.C. Code 402 specifies that "it shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this chapter" There are three essential elements of proof in cases arising under this statute. The Government is charged with proving Appellant's possession of a substance and the identity ^{4/} of that substance as one proscribed by 33 D.C. Code 402. Malloy v. United States, 245 A.2d 781 (D.C. App. 1968). In addition the Government must show that Appellant was aware or had knowledge of the presence and character of the particular substance.

Admittedly, "knowledge" is not mentioned by the language of 33 D.C. Code 402 ^{5/} as an element of the offense prohibited and no cases on point have been found in this jurisdiction. However, other courts interpreting this same language have held that in order to sustain its burden of proof, the Government must not only prove possession

4. There is no question that the substance herein is proscribed by 33 D.C. Code 402.
5. This statute is the same as Section 2 of the Uniform Narcotic Drug Act which has been adopted by forty-six states, including the District of Columbia and Puerto Rico (91 A.L.R.2d 811).

beyond a reasonable doubt, but must also prove beyond a reasonable doubt that the defendant was aware of both the presence and character of the particular substance he is charged with possessing. Carroll v. Arizona, 368 P.2d 649 (S.Ct. Ariz. 1962); Arizona v. Hunt, 370 P.2d 642 (S.Ct. Ariz. 1962); Petty v. Colorado, 447 P.2d 217 (S.Ct. Colo. 1968); Mickens v. Colorado, 355 P.2d 679 (S.Ct. Colo. 1961); Illinois v. Truelock, 220 N.E.2d 187 (S.Ct. Ill. 1966); Illinois v. Pigrenet, 186 N.E.2d 306 (S.Ct. Ill. 1962); Louisiana v. Maney, 135 So.2d 473 (S.Ct. La. 1961); New Jersey v. Reed, 170 A.2d 419 (S.Ct. N.J. 1961); Wallace v. Nevada, 359 P.2d 749 (S.Ct. Nev. 1961); New Mexico v. Gonzalez, 435 P.2d 210 (N.M. App. 1967); New York v. Phippen, 227 N.Y.S.2d 64 (N.Y. App. Div. 1962); Sosa v. Texas, 275 S.W.2d 655 (Tex. Crim. App. 1955); Medina v. Texas, 296 S.W.2d 273 (Tex. Crim. App. 1956). Moreover, the Government's recognition of "knowledge" as an essential element of the crime is evident from a reading of the True Bill which charges Appellant with "knowingly" possessing a narcotic drug.

Appellant's counsel has found cases from four states wherein the courts have held that "knowledge" is not an essential element of the crime under the Uniform Act. Washington v. Bo is, 358 P.2d 124 (S.Ct. Wash. 1961); Massachusetts v. Lee, 117 N.E.2d 830 (S.J.C. Mass. Worcester 1954); Davis v. Maryland, 262 A.2d 578 (Ct. Spec. App. Md. 1970); Broic v. Florida, 79 So.2d 775 (S.Ct. Fla. 1955).

Later cases in Washington and Massachusetts have either expressly or impliedly overruled or limited the earlier decisions.

Washington v. Hennings, 1475 P.2d 926 (Ct. App. Wash. 1970);

Massachusetts v. Buckley, 238 N.E.2d 335 (S.J.C. Mass. Suffolk 1968);

Massachusetts v. Tirella, 249 N.E.2d 573 (S.J.C. Mass. Suffolk 1969).

In addition, all the cases found wherein it was held that "knowledge" was not an essential element, possession had been found by means of strong direct evidence on which an inference of knowledge could have been easily based.

B. The Standard For Passing On Motion For Acquittal

The standard by which trial judges in this Circuit are to be guided in passing on a motion for judgment for acquittal was well stated by Judge Prettyman in the leading case of Curley v. United States, 81 U.S. App. 389, 160 F.2d 229 (1947), cert. denied, 331 U.S. 837 (1947) as follows:

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weight the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

In other words, in deciding whether to submit a case to a jury, a trial judge must consider whether reasonable jurymen must necessarily have a doubt. Crawford v. United States, 126 U.S. App.

156, 158, 375 F.2d 323, 334 (D.C. Cir. 1967); Bailey v. United States, 135 U.S. App. D.C. 95, 416 F.2d 1110 (D.C. Cir. 1969); Powell v. United States, 135 U.S. App. D.C. 254, 418 F.2d 470, 473 (D.C. Cir. 1969); United States v. Sutton, U.S. App. D.C. , 426 F.2d 1202 1210 (D.C. Cir. 1969); Johnson v. United States, U.S. App. D.C. 426 F.2d 651 (D.C. Cir. reh. en banc 1970), cert. granted, 400 U.S. 864 (1970). In passing on a motion for acquittal the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences. United States v. Bridges, U.S. App. D.C. , 432 F.2d 692, 694 (D.C. Cir. 1970); Bailey v. United States, supra, 416 F.2d 1112-1113; Glasser v. United States, 315 U.S. 60, 80 (1942); Gordon v. United States, 438 F.2d 858, 867 (5th Cir. 1971).

Still the Government must sustain its burden of proving every element of the crime charged beyond a reasonable doubt. Holland v. United States, 348 U.S. 121 (1954). And the judge must not let the jury act on what would amount to a mere possibility, speculation, conjecture or surmise. Bailey v. United States, supra, 416 F.2d at 1113; Malloy v. United States, 246 A.2d 781 (D.C. App. 1968); Jackson v. District of Columbia, 180 A.2d 885 (D.C. Mun. App. 1962); Hill v. District of Columbia, 264 A.2d 145 (D.C. App. 1970). Moreover, the

Government must negate all reasonable inferences consistent with innocence. Malloy v. United States, supra. Baker v. District of Columbia, 184 A.2d 198 (D.C. Mun. App. 1962). See also, Hill v. District of Columbia, 264 A.2d 145 (D.C. App. 1970); United States v. Fox, 149 U.S. App. D.C. , 433 F.2d 1235 (D.C. Cir. 1970); Hiet v. United States, 124 U.S. App. D.C. 313, 365 F.2d 504 (D.C. Cir. 1966); Surrett v. United States, 421 F.2d 403 (5th Cir. 1970); Hale v. United States, 410 F.2d 147 (5th Cir. 1969); Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962); Hawaii v. Stuart, 466 P.2d 444 (S.Ct. Hawaii 1970); Missouri v. Thomas, 452 S.W.2d 160 (S.Ct. Mo. 1970).

C. The Government's Evidence Was Insufficient To Warrant Conviction

Appellant's conduct, taking the view most favorable to the Government, amounted to Appellant's presence in a public area moments before a narcotic was found. One element of the crime in question is "possession" of the narcotic by the accused. Therefore, crucial inquiry in this case relates to the legal sufficiency of the evidence to sustain a jury determination that Appellant possessed a narcotic.

An inference of possession was recently rejected on appeal in a case whose facts closely parallel the facts herein. In Malloy v. United States, supra, Malloy was convicted of unlawful possession of a narcotic under the same statute under which Appellant herein was convicted.

The Government's case in Malloy was based upon the testimony of two police officers. The officers, were checking out a report at Saint Elizabeth's hospital that "someone was passing something" to patients. The officers observed appellant who met the description of the suspected party leave his car and begin walking towards a building. The officers, approximately twenty-five to thirty feet away, called to appellant. The appellant turned around and made a quick motion as if he were throwing something away. Neither officer saw an object leave the defendant's hand or strike the ground. The officers searched the area and found a wrapper containing narcotic capsules. The court,

overturning the conviction and directing an acquittal, held that:

At most the Government created a strong suspicion that appellant had ever had the [narcotics] in his possession and it was never seen in his hand and it was never seen being thrown by him. In view of the . . . fact that the area was open to all who visited the hospital and to all employees, the distinct possibility is raised that the wrapper [containing the narcotic] had been dropped by someone other than appellant. The Government's evidence fails to negate this reasonable inference. To uphold the conviction we would have to infer from the evidence, first, that appellant threw something, and second, that that something was the wrapper [containing narcotics] which was later found. An inference built upon an inference to prove a material fact is too tenuous an evidentiary foundation to support a criminal conviction.

Here, as in Malloy, the Government has only created a suspicion that Appellant ever had a narcotic in his possession. The package containing the narcotic was never seen in his possession and the police officers never saw Appellant placing anything on the ledge where the narcotic was found. They merely saw his right hand moving in the direction of the ground. What the Government has shown is Appellant's presence in an area shortly before narcotics were discovered. But "mere presence at the scene alone, proves nothing as to possession." Araujo-Lopez v. United States, 405 F.2d 466 (9th Cir. 1969). Physical and chronological proximity is not sufficient to establish guilt. Davis v. United States, 230 A.2d 485 (D.C. App. 1967). Physical proximity to narcotics cannot convict a man of possessing the narcotics. See, for example, Guevara v. United States, 242 F.2d 745 (5th Cir. 1957) (narcotics found under a car seat could not convict a passenger

of their possession); Montoya v. United States, 402 F.2d 847 (5th Cir. 1968) (narcotics found in a truck could not convict a passenger in the truck of their possession); United States v. Landry, 257 F.2d 425 (7th Cir. 1958) (an admission by the defendant that he owned the heroin found on defendant's girlfriend in his presence did not sustain his conviction for possession); United States v. Mills, 293 F.2d 609 (3rd Cir. 1961) (witnessing a sale of heroin did not sustain a conviction for selling heroin). In addition, the narcotic was found herein in a public place not exclusively in the control or possession of Appellant. Under even more suspicious circumstances, a conviction for possession of narcotics was reversed because the drugs were found in an area to which the defendant had access in common with tenants of only seven other apartments. People v. Jackson, 23 Ill.2d 360, 178 N.E.2d 320 (S.Ct. Ill. 1967). Here, the parking lot was open to the public and there is no telling how many people were in the lot the day the narcotics were found.

In the Jackson case, narcotic agents arrested the defendant at the door of her apartment. After inviting the agents inside defendant ran to the bathroom and locked the door. After a short interval the agents were admitted to the bathroom. Heroin was found in an air well beneath defendant's window.

Although recognizing a strong probability that defendant had possessed the heroin, the court nevertheless reversed because mere probability or suspicion is not sufficient. See also, Hill v. District of

Columbia, 264 A.2d 145 (D.C. App. 1970) (presence of a pistol in the defendant's car could not sustain a conviction for possession as the presence of a passenger in the car permitted the inference that the defendant did not have exclusive control over the contents of the car).

At most, the Government's evidence has shown a mere probability that Appellant possessed the narcotic. But a preponderance of the evidence or a mere probability raised by the evidence will not sustain a criminal conviction. See Stevens v. United States, 175 U.S. App. D.C. 332, 319 F.2d 733 (D.C. Cir. 1963); United States v. Carey, 428 F.2d 229 (5th Cir. 1970), cert. den., 91 S.Ct. 78 (1970); Lawrence v. United States, 400 F.2d 624 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967). These cases involved auto theft wherein presence in a stolen car merely raised a probability that the defendants knew the cars to be stolen or transported across a state line. Such evidence was insufficient to sustain the convictions.

Evidence which merely raises suspicions likewise will not sustain a conviction. See for example, Hiet v. United States, 124 U.S. App. D.C. 313, 365 F.2d 504 (D.C. Cir. 1966). (Presence of defendant's fingerprints on the inside of the window of a car which had been broken into did not sustain a conviction for burglary as the prints raised a mere suspicion.) Borum v. United States, 127 U.S. App. D.C. 48, 380 F.2d 595 (D.C. Cir. 1967) (fingerprints of defendant found on a recently purchased jar in a burglarized house could not convict the defendant

as the fingerprints could have been placed on the jar before its purchase). Citing both Hiet and Borum, United States v. Collon, 426 F.2d 939 (6th Cir. 1970) (defendant's fingerprints on a map in the getaway car could not convict him of bank robbery).

To sustain the conviction herein this court would have to infer, first, that Appellant placed something on the ledge and second, that the something was the narcotic found by the police. Both findings, however, can only be premised on speculation, conjecture, suspicion or mere possibility. And such tenuous inferences built upon one another are insufficient to support the conviction.

The Government also offered no direct evidence on the element of knowledge. As there is also no direct evidence on the element of possession, the jury was asked, and permitted to infer two essential elements of the crime charged from testimonial evidence which merely placed him near the place where the narcotics were subsequently found. It is concededly permissible under this uniform statute for a jury to infer knowledge from possession of narcotics. Petty v. Colorado, supra; Arizona v. Hunt, supra; Illinois v. Pigrenet, supra. But in each of the three cases cited, there was either direct testimonial evidence proving possession or much stronger circumstantial evidence.^{6/}

6. In Petty v. Colorado, possession and knowledge were inferred from the presence of the narcotic in a box containing the defendant's personal papers in his apartment next to his stereo. His roommate's conviction was reversed on the same evidence.

As a further example, the facts in Carroll v. Arizona, supra, are similar to the Appellant's case. The defendant in Carroll was approached by police officers in the waiting room of an airport and was seen to make a throwing motion. The defendant was arrested on his plane by the officers who had searched the waiting room and found a container of heroin. Reversing the conviction, the court said:

The evidentiary claim must so link the defendant to the narcotic that the inference he knew of its existence and to presence where found may be fairly drawn.

There must be a presentation of a specific fact from which the jury may reasonably infer the defendant knew of the existence of the narcotic, as found in his immediate vicinity before he may be charged with its possession.

The evidence presented against the Appellant presents no specific facts on which to base either an inference of possession or an inference of knowledge.

Appellant contends that the evidence offered by the Government on the elements of possession and knowledge was legally insufficient in that a jury must of necessity have had a reasonable doubt as to the Appellant's guilt which should have precluded the submission of the Government's case to the jury.

II. THE TRIAL JUDGE ERRED IN FAILING TO ADEQUATELY INSTRUCT THE JURY AS TO "KNOWLEDGE", AN ESSENTIAL ELEMENT OF THE CRIME

As noted above, "knowledge" is an essential element of the crime allegedly committed by Appellant. Thus, it was a fundamental error for the judge to have submitted the case to the jury without an adequate instruction on or definition of this essential element.

United States v. Bryant, 137 U.S. App. D.C. 124, 420 F.2d 1377

(D.C. Cir. 1969); Mitchell v. United States, 129 U.S. App. D.C. 292, 394 F.2d 767 (D.C. Cir. 1968); Liles v. United States, 129 U.S. App.

D.C. 268, 393 F.2d 669 (D.C. Cir. 1967); Jackson v. United States,

121 U.S. App. D.C. 160, 342 F.2d 772 (D.C. Cir. 1965); Byrd v.

United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (D.C. Cir. 1965);

McDonald v. United States, 109 U.S. App. D.C. 98, 284 F.2d 232

(D.C. Cir. 1960); Mullen v. United States, 105 U.S. App. D.C. 25,

263 F.2d 275 (D.C. Cir. 1958); Williams v. United States, 75 U.S.

App. D.C. 299, 131 F.2d 21 (D.C. Cir. 1942).

The Judge instructed the jury in these words (Tr. 65):

Now the elements of this crime are simple and the elements that the Government must prove beyond a reasonable doubt are these:

That in the District of Columbia the Defendant knowingly and willingly had in his possession or under his control a narcotic drug, that is, cocaine.

In instructing on the inferences which can be drawn from circumstantial evidence, the judge neglected to mention knowledge. The judge did not define knowledge.

It is a grave error to send a case to the jury without accurately defining the offense charged and each element of the offense charged. Reading the indictment is not sufficient. 2 Wright Federal Practice and Procedure §487 (1970). In United States v. Harris, 346 F.2d 184 (4th Cir. 1965) citing Screws v. United States, 325 U.S. 91 at 106-107, 655 S.Ct. 1031, 29 L.Ed. 1495 (1945), the court said:

In every criminal prosecution . . . an exposition of the constituents of the offense is mandatory and indispensable.

Accord, United States v. Schmitt, 376 F.2d 751 (4th Cir. 1967).

It is not a sufficient instruction to read the statute.

United States v. Hernandez, 290 F.2d 86 (2nd Cir. 1961) (failure to define possession). See also United States v. Krosky, 418 F.2d 65 (6th Cir. 1969) (reversal of a conviction for draft evasion for failure to properly define "knowingly" and failure to explain "willfulness").

In Byrd v. United States, supra, the court found fundamental error in a failure to charge on the element of intent in a case of robbery where the judge merely read to the jury the statute saying:

The charge to the jury contains neither a recitation nor a discussion of the elements of the offense for which the defendant was on trial.

In accord: Screws v. United States, supra; Virgin Islands v. Carmona, 422 F.2d 95 (3rd Cir. 1970); Walker v. United States, 342 F.2d 22 (5th Cir. 1965); cert. denied, 382 U.S. 859 (1965); United States v. Urbana, 412 F.2d 108 (5th Cir. 1969); Liles v. United States, supra; Jackson v. United States, supra; United States v. Bryant, supra; Mitchell v. United States, supra.

Interpreting the uniform statute, the court in New Mexico v. Giddings, 352 P.2d 1003 (S.Ct. N.M. 1960) found error in a refusal to instruct on the element of knowledge. See also Sosa v. Texas, supra.

Such fundamental error is not excused or waived by Appellant's failure to request a proper instruction. United States v. Bryant, supra, 420 F.2d at 1332; Jackson v. United States, supra, 348 F.2d at 773-774; McDonald v. United States, supra, 284 F.2d 233; Williams v. United States, supra, 131 F.2d at 22; Miller v. United States, 120 F.2d 968, 972 (10th Cir. 1941). See also, Findley v. United States, 362 F.2d 921, 922 (10th Cir. 1966) where the court stated

Certainly the failure to instruct as to the necessary elements of the offense charged affects the substantial rights of an accused and such error is "plain error" as contemplated by Rule 52(b).

In Findley, the judge's instructions were insufficient because they failed to recite the necessity of the Government proving beyond a reasonable doubt an essential element of the crime (statutory larceny, 18 U.S.C. §641), knowledge that the property belonged to the United States and had been stolen from the United States. Cites Screws v.

United States, supra. See also, United States v. Howey, 427 F.2d

1017 (9th Cir. 1970) where the court in refusing to follow Findley's holding that "knowledge" is an essential element of the offense stated in 18 U.S.C. §641, stated:

If [knowledge is an essential element Appellant's] conviction must be reversed because the jury was not instructed upon that element.

CONCLUSION

Appellant, therefore, urges that the judgment of the court below should be reversed with directions to grant his motions for judgment of acquittal if, as he argues, it should be determined that there was no substantial evidence to warrant his conviction and, otherwise, with directions to grant him a new trial.

Respectfully submitted,

Malcolm Lassman
Akin, Gump, Strauss, Hauer & Feld
602 Madison Office Building
1155 Fifteenth Street, N. W.
Washington, D. C. 20005

(Tele: 202/833-3816)

Counsel for Defendant - Appellant
Appointment of the
United States Court of Appeals

Dated: June 11, 1971

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1172

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH WEAVER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNEY,
United States Attorney.

JOHN A. TERRY,
HERBERT B. HOFFMAN,
BARRY WM. LEVINE,
Assistant United States Attorneys.

Cr. No. 1428-70

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 30 1971

Nathan J. Deal
CLERK

INDEX

	Page
Counterstatement of the Case.....	1
Argument:	
I. The evidence was sufficient to support appellant's conviction of possession of cocaine.....	5
II. The jury was properly instructed that appellant was charged with "knowing" possession of cocaine.....	6
Conclusion	8

TABLE OF CASES

* <i>Byas v. United States</i> , 86 U.S. App. D.C. 309, 182 F.2d 94 (1950)	7
* <i>Byrd v. United States</i> , 114 U.S. App. D.C. 117, 312 F.2d 357 (1962)	7
* <i>Crawford v. United States</i> , 126 U.S. App. D.C. 156, 375 F.2d 332 (1967)	6
* <i>Curley v. United States</i> , 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947)	6
<i>Thompson v. United States</i> , 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968)	6
* <i>United States v. Hardin</i> , — U.S. App. D.C. —, 443 F.2d 735 (1970)	7
* <i>United States v. Holland</i> , — U.S. App. D.C. —, 445 F.2d 701 (1971)	6
<i>United States v. Moore</i> , 140 U.S. App. D.C. 309, 435 F.2d 113 (1970)	7
* <i>United States v. Powell</i> , D.C. Cir. No. 23,888, decided May 10, 1971	7
<i>Villaroman v. United States</i> , 87 U.S. App. D.C. 240, 184 F.2d 261 (1950)	7

OTHER REFERENCES

33 D.C. Code § 402	1, 2
33 D.C. Code § 423	2
Rule 30, FED. R. CRIM. P.	7
JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 44 (1966)	7

* Cases chiefly relied upon are marked by asterisks.

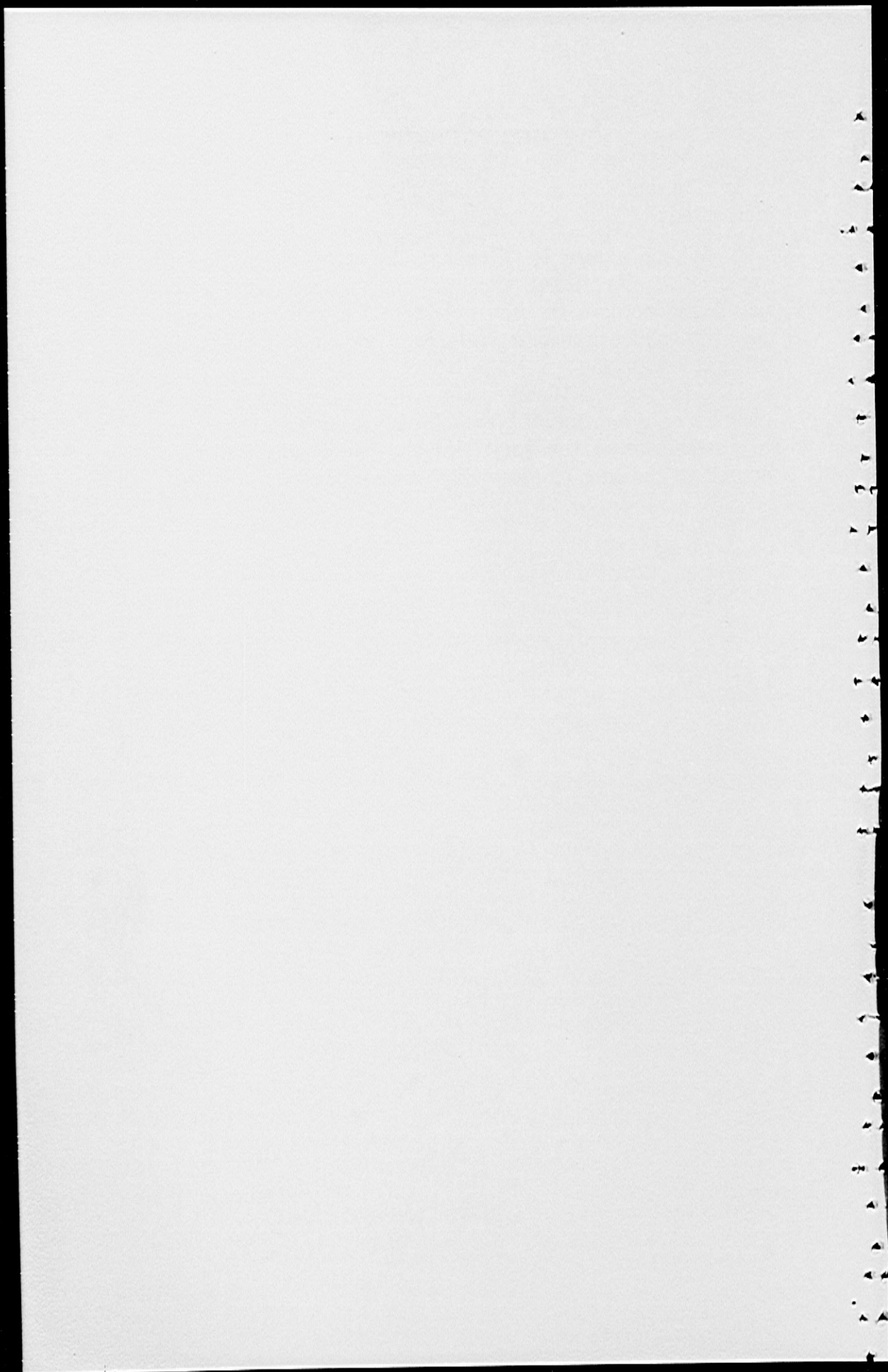
ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Where, moments after appellant was observed surreptitiously depositing something on the ground, the officer found cocaine in that precise place, did the Government introduce sufficient evidence of appellant's possession of that cocaine?

II. Having specifically referred to "knowledge" as an element of the crime of possession of cocaine in the course of its charge to the jury, did the court adequately instruct on the law of "knowing" possession?

* This case has not previously been before this Court.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1172

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH WEAVER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed August 25, 1970, appellant was charged with unlawful possession of a narcotic drug (cocaine) in violation of 33 D.C. Code § 402. On December 9, 1970, a jury trial was commenced with the Honorable George L. Hart, Jr., presiding. The following day the jury returned a verdict of guilty as charged. On February 12, 1971, Judge Hart sentenced appellant to a term of imprisonment for two to six years, to be

served consecutively to any sentence then being served.¹ This appeal followed.

On April 28, 1970, at approximately 5:45 p.m., a 1970 red Mustang in which appellant was a passenger was signaled to halt by Metropolitan Police Officers William F. Penn and Richard L. Jenks, who had observed it from their scout car. The car pulled to a stop at Georgia Avenue and Farragut Street, N.W., with the scout car stopping about fifteen feet to its rear (Tr. 6-8, 23). The driver of the Mustang, one Thomas Hardy, and the passenger in the scout car, Officer Jenks, both alighted from their respective vehicles and met between them (Tr. 8-9, 15, 23-24). While they were engaged in conversation, appellant got out of the Mustang and walked past the scout car, where Officer Penn still remained seated in the driver's seat (Tr. 8, 24). Appellant continued down the street past a completely vacant² parking lot to the corner (Tr. 15, 24, 26) and then surreptitiously glanced back at the scout car before withdrawing south into an alley behind the Fishboat Carryout³ (Tr. 9-10, 15). A moment later appellant reappeared at the rear of the carryout. He placed his left hand "alongside . . . his zipper of his trousers and his right hand appeared to be up against the wall" (Tr. 10). He assumed that posture for ten to fifteen seconds (Tr. 10, 15) and then again covertly retreated from view (Tr. 11). An instant later he reappeared "peeking" from around the corner of the building. Then Officer Penn saw him furtively "lean[ing]

¹ On January 11, 1971, an information was filed with the court representing, *inter alia*, that on February 26, 1970, appellant had entered a plea of guilty to a violation of 33 D.C. Code § 402. Accordingly, appellant was sentenced as a second offender under 33 D.C. Code § 423.

² Officer Jenks, corroborating the testimony of Officer Penn, said, "There were no vehicles or persons on the lot at this time" (Tr. 26). However, neither officer knew what type of traffic had been on that lot during the earlier part of the day (Tr. 20, 35).

³ Officer Jenks testified that he thought it was called the Shrimp-boat Carryout (Tr. 27).

to his right and downward" (Tr. 11) before heading back into the alley (Tr. 11, 16-17, 28-29). Officer Penn immediately went to investigate the area vacated by appellant. As Officer Penn approached, appellant walked eastward across the parking lot adjacent to the carryout and back to the Mustang (Tr. 11-12, 16). Officer Penn testified, "I observed a wet area where Mr. Weaver was standing, and alongside that area there was a ledge [of the building] at which a plastic container, a plastic bag, was found with several packages of aluminum foil in it" (Tr. 12, 18). Although the bag was not seen in appellant's hand (Tr. 20-21, 35; but see Tr. 29), it was found in the precise vicinity where appellant had lowered his hand (Tr. 19, 29). The bag was retrieved by Officer Penn and taken back to the scout car, where in the presence of Officer Jenks he opened it and found that the foil packets contained white powder (Tr. 12, 30).

It was stipulated that the plastic bag contained twelve foil packets, each of which contained loose white powder which after chemical analysis was determined to be 7,500 milligrams of cocaine (Tr. 36-37). It was the opinion of experts that such an abundance of cocaine was then worth \$450.00 if purchased from "dope pushers" in the District of Columbia (Tr. 53-56). Over the objection of defense counsel⁴ the cocaine was admitted into evidence (Tr. 37-38). Counsel then made a motion for judgment of acquittal, asserting that the government had failed to prove that appellant was in fact in possession of the contraband. The court denied the motion, noting that the combination of both the direct and circumstantial evidence was sufficient to permit the case to go to the jury (Tr. 39-40).

Appellant was the sole witness in his defense. He testified that after work he went to a friend's house to have a "few drinks" (Tr. 41-42); however, the friend was known to appellant only as William, and appellant did not know William's precise address (Tr. 44). He

⁴ Appellant's trial counsel does not represent him on this appeal.

left William's home at approximately 5:30 p.m. (Tr. 45) and tried unsuccessfully to hail a taxicab (Tr. 42, 45). A Mr. Hardy, who was known to appellant "from seeing him, but not personally" (Tr. 46), drove by and offered appellant a ride (Tr. 42, 46). While in the car appellant advised Mr. Hardy that "I had to take a urine and I told him, '... the first gasoline station you get to, stop,' so I could take a urine." Appellant continued, "But before he could stop, Officer Jenks had pulled him over. So at that time I just took it on my own and went around the building to take a leak" (Tr. 42-43). He denied that he possessed or even saw narcotic drugs at that time and place (Tr. 43, 50). Notwithstanding the presence of a gas station at Georgia Avenue and Farragut Street, appellant paid "no attention to it" and relieved himself on the wall of a building (Tr. 51).

At the close of all the evidence appellant's counsel renewed his motion for judgment of acquittal, again contending that the government had failed to prove the element of possession (Tr. 57-58). Again the motion was denied (Tr. 58-59).

After closing argument the court proceeded to charge the jury (Tr. 59-68). Prefacing its instructions pertaining to the elements of the crime, the court read from the indictment:

On or about April 28, 1970, within the District of Columbia, Joseph Weaver did *knowingly* and unlawfully possess and have under his control a narcotic drug, that is 7,500 milligrams of cocaine. (Tr. 64) (emphasis supplied).

The court then specifically addressed itself to the elements of the crime:

Now the elements of this crime are simple, and the elements that the Government must prove beyond a reasonable doubt are these:

That in the District of Columbia, the Defendant *knowingly* and willingly had in his possession or

under his control a narcotic drug, that is, cocaine. (Tr. 65) (emphasis supplied).

In its concluding instructions the court explained the distinction between direct and circumstantial evidence and informed the jury that it should accord both types of evidence equal consideration in its deliberations (Tr. 65-66). Both the prosecutor and defense counsel affirmatively stated to the court that they had neither objection nor suggestion pertaining to the instructions (Tr. 66-67). The jury then retired to deliberate upon its verdict (Tr. 68).

ARGUMENT

I. The evidence was sufficient to support appellant's conviction of possession of cocaine.

(Tr. 6-59)

Appellant assails the sufficiency of the government's case, arguing that the government failed to introduce a quantum of evidence upon which a reasonable man could conclude that appellant in fact possessed the cocaine he was convicted of possessing. We disagree.

When the car in which appellant was a passenger was brought to a stop by the pursuing police car, appellant quickly alighted from the car and went forthwith to the rear of the carryout on the corner of Georgia Avenue and Farragut Street (Tr. 6-9, 15, 24, 26). Ostensibly, his sole purpose was to urinate; however, notwithstanding the fact that he had asked Hardy to stop at a gas station so that he might relieve himself, he ignored the one that was located at that very intersection. One could reasonably conclude, therefore, that his primary mission was to rid himself of the contraband; only incidental to that mission did he distract attention by urinating on the wall.

This conclusion is supported by the fact that appellant stealthily peered back toward the police car, walking in and out of view, before clandestinely dipping down to

dispose of the cocaine (Tr. 9-11, 15-17, 28-29). Rather than haphazardly casting away the contraband, he meticulously selected a ledge on which to secret the drug, no doubt contemplating that at the appropriate moment he could return to retrieve it. While neither of the police officers saw appellant with the narcotics in his hand (Tr. 20-21, 35), he was seen depositing "something" (Tr. 19, 29). Found in the precise area where he relinquished "something" was \$450.00 worth of cocaine. Because cocaine is such a valuable commodity, it is hardly conceivable that it was lost, misplaced or discarded by someone else.

This case, like all cases involving questions of possession, must be assessed on its own independent facts. *United States v. Holland*, — U.S. App. D.C. —, —, 445 F.2d 701, 703-704 (1971) (concurring opinion). Viewing the evidence in this case in the light most favorable to the Government, a reasonable man might conclude that appellant in fact was in possession of the cocaine in question. *Crawford v. United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947). Even as a "close case" on the issue of possession, it was one for the trier of fact. *Thompson v. United States*, 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968). The court did not err in denying appellant's motion for a judgment of acquittal and permitting the case to go to the jury.

II. The jury was properly instructed that appellant was charged with "knowing" possession of cocaine.

(Tr. 59-68)

Appellant's second assignment of error is that the court failed to define the word "knowledge" and thereby erroneously omitted from its charge to the jury an essential element of the crime of knowledgeable possession of narcotics. Again, we respectfully disagree.

Initially we must point out that appellant bears a heavy

burden to demonstrate plain error, having failed to object to the instructions at trial. The court specifically inquired if appellant's counsel had "any objection or suggestion" to the charge as given, and the response was in the negative (Tr. 66-67). Having been satisfied at trial, he should not now be heard to complain on appeal. *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); Rule 30, FED. R. CRIM. P.

In the course of its charge the court read from the indictment (Tr. 65), instructing the jury that the indictment was the means "by which he [appellant] is informed of the charges made against him" (Tr. 62). The indictment included language that appellant did "*knowingly . . . possess . . . a narcotic drug*" (Tr. 64) (emphasis supplied). Thus the jury learned that knowledge was a function of possession as an element of the crime. The court then made specific reference to "the elements of this crime," cautioning that the government had the burden to prove each element beyond a reasonable doubt. Included in its recitation of those elements was that "the defendant *knowingly . . . had [a narcotic drug] in his possession . . .*" (Tr. 65) (emphasis supplied). Thus the jury was once again instructed that knowledge had to accompany possession. The absence of further embellishment or elaboration by the court as to the meaning of "knowledge" does not render the instruction defective. See *United States v. Powell*, D.C. Cir. No. 23,888, decided May 10, 1971; *United States v. Moore*, 140 U.S. App. D.C. 309, 435 F.2d 113 (1970). The word is of universal usage and is commonly understood.⁵ *United States v. Powell, supra*; *United States v. Hardin*, — U.S. App. D.C. —, 443 F.2d 735 (1970); *Byrd v. United States*, 114 U.S. App. D.C. 117, 312 F.2d 357 (1962); *Byas v. United States*, 86 U.S. App. D.C. 309, 182 F.2d 94 (1950). Nothing further was required.

⁵ Even the "red book" instruction, JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 44 (1966), does not enhance the definition of "knowingly" beyond the obvious.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HERBERT B. HOFFMAN,
BARRY WM. LEVINE,
Assistant United States Attorneys.

